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Chrysler Dodge Country, USA Inc., a Utah Corporation, v. Louise Curley : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS FOR THE STATE OF UTAH

880424

CHRYSLER DODGE COUNTRY, USA INC., a Utah Corporation,	*	REPLAY BRIEF OF APPELLANT
Plaintiff/Respondent,	*	
v.	*	Case No. 880424-CA
LOUISE CURLEY,	*	
Defendant/Appellant.	*	Priority No. 14B

REPLY BRIEF OF APPELLANT

An appeal from a judgment in the First Circuit Court, Logan City, Cache County, State of Utah entered by Judge Ted S. Perry, Circuit Judge.

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REPLY BRIEF OF APPELLANT

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

The issues are outlined in Plaintiff's and Defendant's briefs.

STATEMENT OF FACTS

Defendant disagrees with several of Plaintiff's allegations of fact. Plaintiff states that, "There is no evidence that the truck was on the Reservation when Chrysler Credit repossessed the truck". That is not true because Defendant clearly testified that the truck was on the Reservation when it was repossessed. (TR p. 51). Plaintiff did not object to that testimony and did not offer any evidence to contradict it.

Plaintiff also offers as a fact that Plaintiff repaired the vehicle prior to sale. That is also completely untrue. Plaintiff clearly testified that the vehicle was sold "as is" and that it was not detailed (TR p.33) and that Plaintiff did not try to improve the vehicle prior to sale. (TR p. 41)

Plaintiff states that the vehicle was placed in the car lot for sale but fails to state that it was improperly offered for sale prior to sending any of the required notices to Defendant. (TR p. 28)

Finally, Plaintiff states that the "vehicle was advertised and shown to prospective purchasers". However, Plaintiff also testified that the vehicle was "not in salable condition" (TR p. 38). There was no evidence presented by Plaintiff that the vehicle was advertised for a public sale on a given date. There was no evidence as to the content of the alleged advertising other than that it was "advertised with 10 or 12 other used cars... and it was just placed there as another vehicle" with some unknown price on it. (TR p. 35). There was no evidence that Plaintiff used any reasonable efforts to attract a group of potential buyers to participate in a public sale of the vehicle. (TR pp. 34-36)

SUMMARY OF ARGUMENTS

POINT I. The burden of proof was on the Plaintiff to show that the truck was lawfully repossessed by his assignor under Navajo Tribal Law. Plaintiff failed to prove compliance with the law.

POINT II. Whether the sale was "public" or "private", the Plaintiff has not met the burden of proving that "every aspect" of the sale was commercially reasonable.

ARGUMENT

POINT I.

THE BURDEN OF PROOF WAS ON THE PLAINTIFF TO SHOW THAT THE TRUCK WAS LAWFULLY REPOSSESSED BY HIS ASSIGNOR UNDER NAVAJO TRIBAL LAW. PLAINTIFF FAILED TO PROVE COMPLIANCE WITH THE LAW.

Defendant inadvertently failed to actually testify at trial that she was a Navajo Indian. However, there was ample circumstantial evidence to prove that fact. Defendant resided on the Navajo Reservation throughout the course of these proceedings. It was also apparent to anyone at trial that Defendant's physical appearance was adequate testimony that she is a Navajo Indian. It is important to note that at no point in the trial did Plaintiff ever question that Defendant was a Navajo Indian. To do so would have seemed ridiculous in light of Defendant's physical appearance. Whether Defendant was actually Navajo Indian or not should have no bearing on the result of the case since the interests sought to be protected by the applicable provisions of the Navajo Code would be equally impacted even if Defendant were not a Navajo Indian. That is, the maintenance of peace and order on the Reservation. There is no basis for Plaintiff's confusing argument that the Court cannot take judicial notice of the jurisdiction of a Court of the Navajo Nation within its territory. The Court needs only follow prior case law which establishes that the Navajo Indians were given power to exercise tribal self-government and promulgate regulations for territorial management over Indians and non-Indians. Babbit Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587, 591-94 (9th Cir. 1983). The United States Supreme Court adopted the

view of the Senate Judiciary Committee that defined the parameters of the right of the Indians to govern themselves when it explained that the Indian Tribes have "the right of self-government and jurisdiction over the persons and property within the limits of the territory they occupy." Id., at 593 (emphasis added) (quoted in Menion v. Jicarilla Apache Tribe, 455 U.S. 130, 140 (1981). Babbitt Ford and its precedents clearly establish that the Navajos have jurisdiction over their entire territory or reservation so that Plaintiff's assignor, Chrysler Credit, was bound to follow Navajo law.

The truck was repossessed while in the possession of Defendant's brother-in-law, and Defendant's brother-in-law was living on the reservation. (TR 45-46). Defendant testified that the truck was repossessed from the Navajo Reservation. (TR 51). Since the truck was on the Reservation, Chrysler Credit had to adhere to Navajo law. Plaintiff presented no evidence that assignor complied with the tribal law.

Plaintiff argues that it should not be penalized for Chrysler Credit's illegal repossession because there was no agency relationship between them. Defendant agrees that there was no agency relationship between Plaintiff and Chrysler Credit. Defendant asserts that there is an assignment relationship between Chrysler Credit Corporation and Plaintiff. Plaintiff was bound to accept the truck back when there was a payment default. (TR 7-8). On the final page of the Retail Installment Contract under the heading of "Assignment", Plaintiff agreed to buy back the truck in case of default. (Appellant's Brief,

Addendum, A-6). Defendant believes that Plaintiff should be held to the specific words of the Contract and the Court should find that any defenses Defendant has against Chrysler Credit, the assignor, are also applicable against Plaintiff.

There was no evidence presented by the Plaintiff that Chrysler Credit received the required consent under the Navajo Code by obtaining written consent from the Defendant, or a Court order from a Navajo Tribal Court. The burden of proof is on the Plaintiff, not the Defendant, to prove that its assignor complied with the statute. Since the Plaintiff has not met the burden of proving that the repossession was valid, the Plaintiff, as assignee, should be barred from receiving any deficiency judgment.

POINT II.

WHETHER THE SALE WAS "PUBLIC" OR "PRIVATE", THE PLAINTIFF HAS NOT MET THE BURDEN OF PROVING THAT "EVERY ASPECT" OF THE SALE WAS COMMERCIALLY REASONABLE.

Plaintiff argues that Defendant misunderstands the standard of review applicable to this case. Contrary to Plaintiff's arguments, Defendant merely asserts that the trial court abused its discretion by finding that Plaintiff has met its burden of proving that "every aspect of the disposition including the method, manner, time, place, and terms" were commercially reasonable. Pioneer Dodge Center, Inc. v. Glaubensklee, 649 P.2d 28, 30 (Utah 1982). Defendant contends that Plaintiff has not and cannot prove that every aspect of the sale was commercially reasonable.

Defendant previously argued that Plaintiff made an unreasonable private sale. Plaintiff now alleges in its brief that a public sale took place in this case, relying on the fact that the truck was advertised to the public and it was for sale on their lot. Defendant maintains that there was no public sale in this case. Utah Code Annotated § 70-9-504(3) leaves public sale and private sale undefined. However, the Utah Supreme Court has defined the boundaries of a public sale in Glaubensklee. The Court quoting from other sources, stated first that public sale has meant "a sale in which the public, upon proper notice, is invited to participate and given full opportunity to bid upon a competitive basis for the property placed on sale, which is sold to the highest bidder." Id., at 30 The Court quoted the Restatement of Security § 48 comment that a public sale is "one to which the public is invited by advertisement to appear and bid at auction for the goods to be sold." Id. The Court also quoted Gilmore's, view of a public sale which states:

> Presumably the essence of a `public sale' is that the relevant public is not only invited to attend but is also informed, by whatever means of publicity may be appropriate, when and where the sale is to be held. If the sale has not been appropriately publicized, it would not be a public sale no matter where it was held or how it was conducted.

Id.

The notice to the Defendant of the sale did not state whether this was a public or a private sale. (Appellant's Brief, Addendum, A-7). The truck was allegedly advertised generally with 10 or 12 other used cars but there was no indication that the advertisement explained that this was a

repossessed truck for sale on a specified date, at a specific time, at Plaintiff's place of business. The Plaintiff produced no advertisement for the Court to examine. (TR 34-36). There is no evidence that proves that the public was invited to a public auction to bid on a competitive basis for the truck. The record is barren as to whether a public auction even took place and the burden is on the Plaintiff to prove that the advertisements conformed to the Code, that there was an auction where competitive bidding took place, and that the public knew the date, time, and place of the auction. There were simply three private wholesale bids given in addition to Plaintiff's own bid. Public sale means that the public is involved and there is no evidence to show that the public met for an auction. Robert Davis, the manager of Davis Chrysler Dodge testified that when he bought the truck it was "very rough, dirty; it had a number of things that we had to repair to put it in salable condition." (TR 55). Therefore, even when the truck was alleged to be on Plaintiff's lot for "public sale" it was not in salable condition. It is of little surprise that no one from the public would want to buy it. There is nothing that Plaintiff has done to meet its burden of proof that this was a commercially reasonable sale in all aspects.

Whether the Court finds that this was a public sale or a private sale makes no difference to the Defendant because either way, the sale was commercially unreasonable. In the event that the Court finds that this was a private sale, Plaintiff violated the self-dealing prohibitions of the Code. Plaintiff cites no

case law for the proposition that there is a recognized market for used cars, and that they are subject to widely distributed standard price quotations under the private sale self-dealing exceptions. Defendant stands by Community Management Ass'n of Colorado Springs v. Tousley, 505 P.2d 1314 (Colo. 1973) and Carter v. Rayburn Ford Sales, Inc., 451 S.W.2d 199 (Ark. 1970) for the proposition that automobiles do not come within either exception.

Plaintiff cites no authority for the proposition that Courts have disagreed whether used cars can be sold to the secured party at a private sale. Defendant asserts that Vic Hanson & Sons v. Crowley, 57 Wis.2d 106, 203 N.W.2d 728 (1973) and Jackson State Bank v. Beck, 577 P.2d (Wyo. 1978) are precedent that self-dealing at a private sale is commercially unreasonable. If the Court held that this was a private sale, it was commercially unreasonable because of the violation of the Navajo Tribal Code, only three bids were solicited, the advertising was inadequate, notice was faulty, there was self-dealing when one family owned business sold the truck to another business owned by the same family, and it was sold at wholesale rather than retail.

If the Court finds as the Plaintiff desires, that this was a public sale, it was commercially unreasonable because the public was not informed of the time, date, and place of the sale, there was no auction where the public could competitively bid, no public bids were solicited, and the truck was not even in salable condition.

Since the facts indicate that Plaintiff did not even make as much effort as the seller who had his deficiency barred in Glaubensklee, to ensure that the sale was commercially reasonable, the trial court clearly abused its discretion by failing to bar Plaintiff's judgment. In Glaubensklee, the Court stated:

> The only efforts to obtain buyers consisted of taking the truck to a few lots and obtaining oral bids of undisclosed amounts; placing the truck on the sales lot for a few days; and announcing the sale over the loudspeaker immediately prior thereto. These efforts did not give reasonable notice to that part of the public which would likely be interested in the sale.

Id., at 31.

At least in Glaubensklee, there was notice to the public over the loudspeaker. Plaintiff did not even make that much effort. Plaintiff's deficiency judgment should be barred because it remains that every aspect of the disposition of the truck in this case was not commercially reasonable.

CONCLUSION

Defendant therefore requests that the Judgment of the Circuit Court be reversed, barring Plaintiff's deficiency judgment because of Plaintiff's violations of the Utah Uniform Commercial Code and/or allowing a $2,186.75 offset for violations of the Navajo Tribal Code.

Respectfully submitted this 25th day of November, 1988.

RICHARD A. HUMMEL
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed 4 copies of the foregoing REPLY BRIEF OF APPELLANT to N. GEORGE DAINES, Attorney for Plaintiff/Respondent, 108 North Main, Suite 200, Logan, Utah, 84321 on this 15th day of November, 1988.

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